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MOHAMED TAWFIK TUN DR ISMAIL

v.

HLG CREDIT SDN BHD & ANOR

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COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPPEAL NO: J-03(IM)-183-2010]

C

2 NOVEMBER 2011

BANKRUPTCY: *Jurisdiction - Jurisdiction of court - Judgment creditor in bankruptcy proceedings assigned rights in judgment debt - Whether bankruptcy court could decide on validity of assignment - Whether*

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assignment absolute, valid and effective in law - Whether assignee could be substituted as judgment creditor in proceedings - Whether assignee required leave to enforce/execute assigned debt - Rules of the High Court 1980, O. 46 r. 2(1)(b) - Civil Law Act 1956, s. 4(3) - Courts of Judicature Act 1964, s. 24(c) - Limitation Act 1953, s. 6(3) -

E

Bankruptcy Act 1967, s. 3(1)(i)

Having obtained judgment in a civil suit against the appellant in the Kuala Lumpur High Court, the first respondent ('the assignor') filed a bankruptcy notice ('BN') and, subsequently, a creditor's

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petition ('CP') against the appellant based on the said judgment in the Johor Bahru High Court. While the CP was pending, the assignor executed a Deed of Assignment absolutely assigning all its rights in the judgment debt to the second respondent ('the assignee'). Two notices regarding the assignment were given to the

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appellant on different dates. The assignor then filed an *ex parte* application (encl. 16) to substitute the assignee as the judgment creditor in the pending bankruptcy proceedings. The application was allowed but the appellant succeeded in setting it aside. On the assignor's appeal against the said decision, the order obtained

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by the appellant was set aside and encl. 16 was directed to be reheard *inter partes*. On its rehearing, encl. 16 was allowed by the registrar. The appellant's appeal against that decision was dismissed by the judge.

I

In his appeal against the judge's decision to the Court of Appeal, the appellant contended that (i) the High Court in exercising its bankruptcy jurisdiction did not have jurisdiction to hear, or make any decision, on the issue of the validity of the assignment of the judgment debt (ii) the assignee lacked *locus* to execute the judgment or continue with the pending bankruptcy proceedings because it had not obtained leave from the court in which the judgment was obtained to execute/enforce the judgment pursuant to O. 46 r. 2(1)(b) of the Rules of the High Court 1980 ('RHC'). The respondents argued that the said provision was not applicable to bankruptcy proceedings. They also submitted that the bankruptcy court had jurisdiction to hear and decide the matter of the substitution.

Held (unanimously dismissing the appeal with costs)
Per Ramly Ali JCA delivering the judgment of the court:

(1) The assignment in question was an absolute assignment, valid and effective in law to pass and transfer the legal title to the judgment debt to the assignee. It could be enforced by the assignee in a court of law including the bankruptcy court. The assignee was therefore entitled to be substituted as the judgment creditor in place of the assignor in the pending bankruptcy proceedings. (paras 18, 19, 33 & 35)

(2) The assignee was clearly a person who was "for the time being entitled to enforce a final judgment or final order" and deemed to be "a creditor who has obtained a final judgment or final order" as stipulated under the proviso to s. 3(1)(i) of the Bankruptcy Act 1967. (para 34)

(3) There were strong authorities which said that bankruptcy proceedings did not fall within the ambit of writs of execution as defined under O. 46 r. 1 RHC. Even assuming O. 46 r. 2 RHC applied to bankruptcy proceedings, it was clear from the wordings of the provisions that leave would only be needed in respect of the 'issuance' of the bankruptcy proceedings *ie*, when the BN and CP were issued. (paras 27 & 29)

(4) The BN and CP had already been issued in the name of the assignor. The application for substitution of the judgment creditor came after the "writ of execution" had been issued.

Order 46 r. 2(1)(b) RHC was clearly intended to refer to cases where there had been a change in parties before a "writ of execution" was issued. (para 29)

(5) At the date of filing of the bankruptcy proceedings, there was no issue of limitation *vis-à-vis* interest. The issue of recovery of interest after the expiry of six years from the date when the interest became due, did not in any way affect the validity of the bankruptcy proceedings, particularly the BN and the CP. Thus, it was not relevant to the application by the respondents to substitute the judgment creditor *vide* encl. 16. (para 37)

Bahasa Malaysia *Translation Of Headnotes*

Setelah memperoleh penghakiman dalam satu tindakan sivil terhadap perayu di Mahkamah Tinggi Kuala Lumpur, responden pertama ('assignor') telah memfailkan satu notis kebankrapan ('NK') dan kemudiannya petisyen pemiutang ('PP') terhadap perayu di Mahkamah Tinggi Johor Bahru. Sementara menunggu pemutusan PP, assignor telah memeterai satu surat ikatan penyerahhakkan dan menyerahhakkan secara mutlak semua hak-haknya di dalam hutang penghakiman kepada responden kedua ('assignee'). Dua notis mengenai penyerahhakkan telah diserahkan kepada perayu pada dua tarikh yang berasingan. Assignor kemudian memfailkan permohonan *ex parte* (lampiran 16) bagi menggantikan assignee sebagai pemiutang penghakiman di dalam prosiding kebankrapan yang sedang berjalan. Permohonan tersebut dibenarkan tetapi perayu kemudian berjaya mengenepikannya. Ekoran rayuan assignor terhadap keputusan tersebut, perintah yang diperoleh perayu telah diketepikan dan lampiran 16 diperintahkan didengar semula secara *inter partes*. Atas pendengaran semula, lampiran 16 telah dibenarkan oleh pendaftar. Rayuan perayu terhadap keputusan tersebut telah ditolak oleh hakim.

Dalam rayuan ke Mahkamah Rayuan terhadap keputusan hakim di sini, perayu berhujah bahawa: (i) Mahkamah Tinggi dalam melaksanakan bidangkuasa kebankrapannya tidak mempunyai bidangkuasa untuk mendengar, atau membuat sebarang keputusan atas isu kesahan serahanhak hutang penghakiman; (ii) assignee tidak mempunyai *locus* untuk melaksanakan penghakiman atau meneruskan dengan prosiding kebankrapan yang sedang berjalan kerana ia tidak mendapat kebenaran dari mahkamah dari mana

penghakiman diperolehi/melaksanakan penghakiman di bawah A. 46 k. 2(1)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Responden-responden berhujah bahawa peruntukkan tersebut tidak terpakai kepada prosiding kebankrapan. Mereka juga berhujah bahawa mahkamah kebankrapan mempunyai bidangkuasa untuk mendengar dan memutuskan mengenai halperkara penggantian.

Diputuskan (sebulat suara menolak rayuan dengan kos)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Serahanhak berkenaan adalah suatu serahanhak mutlak, sah dan berkesan di sisi undang-undang untuk memberi dan memindahkan hak undang-undang terhadap hutang penghakiman kepada assignee. Ia boleh dikuatkuasakan oleh assignee di dalam sebuah mahkamah undang-undang termasuk di mahkamah kebankrapan. Assignee dengan itu berhak untuk digantikan sebagai pemiutang penghakiman menggantikan assignor di dalam prosiding kebankrapan yang masih berjalan.

(2) Assignee adalah jelas seorang yang "pada masa ini berhak untuk menguatkuasakan suatu penghakiman muktamad atau perintah muktamad" dan dianggap sebagai "seorang pemiutang yang telah mendapat penghakiman muktamad atau perintah muktamad" seperti yang diperuntukkan di dalam proviso kepada s. 3(1)(i) Akta Kebankrapan 1967.

(3) Terdapat autoriti-autoriti kukuh yang mengatakan bahawa prosiding kebankrapan tidak termasuk ke dalam lingkungan writ pelaksanaan seperti yang ditakrif oleh A. 46 k. 1 KMT. Jikapun diandaikan A. 46 k. 2 KMT terpakai kepada prosiding kebankrapan, adalah jelas dari perbahasaan peruntukkan bahawa kebenaran hanya diperlukan berkaitan dengan 'pengeluaran' prosiding kebankrapan, yakni bilamana NK dan PP dikeluarkan.

(4) Notis kebankrapan dan PP telah pun dikeluarkan atas nama assignor. Permohonan untuk penggantian pemiutang penghakiman datang selepas "writ pelaksanaan" dikeluarkan. Aturan 46 k. 2(1)(b) KMT jelas diniat untuk merujuk kepada kes-kes di mana terdapat pertukaran pihak-pihak sebelum "writ pelaksanaan" dikeluarkan.

(5) Semasa pemfailan prosiding kebankrapan, isu penghadan berkaitan dengan faedah tidak berbangkit. Isu mendapatkan faedah selepas luput tempoh enam tahun dari tarikh faedah menjadi kena bayar, sama sekali tidak mempengaruhi kesahan prosiding kebankrapan, terutama NK dan PP. Oleh itu, ianya tidak relevan kepada permohonan responden-responden untuk menggantikan pemiutang penghakiman melalui lampiran 16.

Case(s) referred to:

Dato' Fathi Hj Ahmad v. Standard Chartered Bank Malaysia Bhd [2006] 1 CLJ 273 CA ***(refd)***

Harris Adacom Corporation v. Perkom Sdn Bhd [1994] 4 CLJ 683 HC ***(refd)***

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(dist)***

Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC ***(refd)***

Re A Bankruptcy Notice [1898] 1 QB 383 ***(refd)***

Re Mohamad Fadzimi Yaakub, ex p United Malayan Banking Corp Bhd [1998] 1 CLJ 783 ***(refd)***

Legislation referred to:

Banking and Financial Institutions Act 1989, s. 50
Bankruptcy Act 1967, ss. 3(1)(i), 105
Bankruptcy Rules 1969, rr. 274, 276
Civil Law Act 1956, s. 4(3)
Courts of Judicature Act 1964, s. 24(c)
Limitation Act 1953, s. 6(3)
Rules of the High Court 1980, O. 46 r. 1, r. 2(1)(b)

Other source(s) referred to:

The Supreme Court Practice 1822, vol 1, para 46/2/1

For the appellant - Peter Pereira; M/s Peter Pereira
For the respondents - Nad Segaram; M/s Shearn Delamore & Co

[Appeal from High Court, Johor Bahru; Bankruptcy No: 29-3033-2004]

Reported by Ashok Kumar

JUDGMENT

Ramly Ali JCA:

[1] The present appeal is against the decision of the learned Judicial Commissioner dated 5 August 2010 dismissing the appellant's appeal against the decision of the learned Senior Assistant Registrar given on 28 January 2010, dismissing the

preliminary objection of the appellant and allowing the respondent's application (*vide* encl. 16) to substitute the 2nd respondent (HLG Capital Market Sdn Bhd) as the judgment creditor in place of the 1st respondent (HLG Credit Sdn Bhd) in the pending bankruptcy proceeding.

Brief Facts

[2] On 26 February 1999, the 1st respondent obtained a judgment against the appellant at the Kuala Lumpur High Court *vide* Civil Suit No: D2-22-476-1998. On 11 October 2004, the 1st respondent filed a bankruptcy notice (BN) against the appellant at the Johor Bahru High Court *vide* Bankruptcy Suit No: 29-3033-2004 based on the above judgment. On 17 March 2005, the 1st respondent filed a creditor's petition (CP).

[3] In the meantime, while the CP was still pending in court, all rights of the 1st respondent in respect of the appellant's indebtedness under the judgment were assigned to the 2nd respondent; *vide* a deed of assignment dated 24 September 2005. Notices of the assignment dated 23 September 2005 and 11 October 2005 were given to the appellant.

[4] On 1 December 2005, the 1st respondent filed an *ex parte* application (encl. 16) seeking an order to substitute the 2nd respondent as the judgment creditor in the said bankruptcy proceedings. The said *ex parte* application was allowed on 26 July 2006.

[5] The appellant then filed an application to set aside the *ex parte* order dated 26 July 2006. The said application was allowed by the learned SAR on 16 May 2007. On 24 May 2007, the 1st respondent filed an appeal to the judge in chambers against the SAR order dated 16 May 2007. The learned judge allowed the said appeal that the said order dated 16 May 2007 made by the learned SAR was set aside and directed the 1st respondent's application dated 1 December 2005 (encl. 16) be reheard *inter partes*.

[6] Upon rehearing encl. 16, the learned SAR had, on 28 January 2010, allowed the application with costs and further ordered that the 2nd respondent be substituted as the judgment creditor in the pending bankruptcy proceedings. The appellant's

appeal to the judge in chambers against the decision of the learned SAR dated 28 January 2010 was dismissed with costs on 5 August 2010. Hence the present appeal before this court.

[7] The application in encl. 16 was a straightforward application by the 1st respondent on the ground that as the judgment debt, which is the basis of the bankruptcy proceedings, had been absolutely assigned by the 1st respondent to the 2nd respondent, therefore the 2nd respondent should be cited as the judgment creditor in the said proceedings.

The Issue

[8] The main issue before the court is whether upon absolute assignment of the judgment debt which forms the basis of the bankruptcy proceedings, the 2nd respondent (the assignee) can be substituted for the 1st respondent (the assignor) as the judgment creditor in the pending bankruptcy proceedings.

[9] The appellant strongly contended that such substitution cannot be done in the present proceedings on the following main grounds:

(a) the High Court in purporting to exercise bankruptcy jurisdiction lacked jurisdiction to hear or to make any decision which touched on the validity of an assignment of the debt owing under a judgment dated 26 February 1999 entered by the 1st respondent against the appellant at the Kuala Lumpur High Court; and

(b) the 2nd respondent lacked the *locus* to execute the judgment or to otherwise continue the bankruptcy proceedings initially commenced by the 1st respondent at the High Court, by reason of their failure to obtain leave from the court which ordered the judgment (Kuala Lumpur High Court) to execute the judgment pursuant to the provisions of O. 46 r. 2(1)(b) of the Rules of the High Court 1980.

[10] The respondents on the other hand maintained that the said substitution was correct in law and that the bankruptcy court has the jurisdiction to hear and decide on this issue; and the provisions of O. 46 r. 2(1)(b) of the Rules of the High Court 1980 for to leave to execute judgment is not applicable to bankruptcy proceedings.

On The Issue Of Jurisdiction

[11] On the issue of jurisdiction, the appellant argued that the powers exercisable by the High Court under its bankruptcy jurisdiction by virtue of s. 24(c) of the Courts of Judicature Act 1964, are confined and limited to only such powers that are provided for in the Bankruptcy Act 1967. The appellant counsel submitted that the bankruptcy court in Johor Bahru has no jurisdiction to deal with encl. 16 as it relates to the issue of validity of an assignment of an alleged unsatisfied debt under a judgment dated 26 February 1999 made by the Kuala Lumpur High Court. The appellant submitted that the learned Judicial Commissioner ought to have applied the principles enunciated by the Court of Appeal in the case of *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340 and rule this issue in favour of the appellant.

[12] The validity of an assignment is governed by s. 4(3) of the Civil Law Act 1956, which provides:

> (3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[13] The gist of s. 4(3) of the Civil Act 1956 is that in order for an assignment to be effective in law, it must be made in writing, under the hand of the assignor; relates to any debt or other legal chose in action; written notice must be given to the debtor or other person from whom the assignor would have been entitled to receive or claim the debt or choose in action. The legal effect of an assignment which had duly complied with all the relevant requirements, is that it passes and transfers the legal right to the debt or chose in action, from the date of the notice and all legal and other remedies from the same and the power to give good discharge for the same, without the concurrence of the assignor.

[14] For a legal assignment to be valid, express notice in writing must be given to the debtor, but this does not require formal notice. It is sufficient if information relating to the assignment is conveyed to the debtor so that he has notice of the assignment. (See: *Harris Adacom Corporation v. Perkom Sdn Bhd* [1994] 4 CLJ 683).

[15] In the present case, the said deed of assignment dated 23 September 2005 made by the 1st respondent as the assignor, in favour of the 2nd respondent, as the assignee, had complied with all the relevant requirements stipulated under s. 4(3) of the Civil Law Act 1956. The relevant notices were given twice on 23 September 2005 and 11 October 2005 to the appellant as the judgment debtor. The said deed of assignment as well as the notices was exhibited as "M1-1" and "M1-2" in the affidavit affirmed by Mohd Izral Mohamad Khairy filed by the respondents.

[16] What has been assigned under the deed of assignment is set out in cl. 1 thereof. Clause 1 is clear that besides the total debt outstanding as at 23 September 2005 (the date of the deed of assignment), all advantages and benefits under the judgment are also assigned to the 2nd respondent.

Clause 1 clearly provides that "the assignor hereby assigns absolutely into the assignee and the assignee hereby accepts such assignment from the effective date of all the assignor's title and interest in the said debt, together with the right to recover and receive payment of the said debt as well as the benefit of all and any security or collateral given, the benefit and advantage of the judgment. ... in respect of the said debt including but not limited to the right to pursue and/or proceed and/or continue with the said action against the defendants and/or in the case where the defendant and/or borrower is a bankrupt, the right to receive any and all dividends from the estate of the bankrupt ...

Clause 2 of the same deed of assignment further provides that "in respect of the said action and/or judgment of the assignor hereby authorizes the assignee and the assignee hereby agrees to proceed with the same in the name of the assignee and to execute all papers necessary for the continuation of the said action and to receive the benefit of the same whether in settlement, judgment, foreclosure, sale, surplus monies proceedings, bankruptcy or otherwise.

[17] From the deed of assignment and the notices sent to the appellant, there is no doubt that the assignment is an absolute assignment of the total debt as well as all other advantages and benefits attached thereto under the judgment. The advantages and benefits under the judgment carry with them the benefit of costs and thus any costs under the judgment are recoverable. This is not a case where the assignor is assigning to the assignee the amount due and owing up to 23 September 2005 only and maintaining rights in respect of outstanding sum after that date.

[18] The court is satisfied that the assignment in question is an absolute assignment, valid and effective in law.

[19] Being a valid and absolute assignment, it can be enforced by the assignee (the 2nd respondent) in a court of law, including the bankruptcy court, as in the present case. The 2nd respondent is therefore entitled to be substituted as the judgment creditor in place of the 1st respondent in the present bankruptcy proceedings.

[20] The same issue was dealt with by the Court of Appeal in the case of *Dato' Fathi Hj Ahmad v. Standard Chartered Bank Malaysia Bhd* [2006] 1 CLJ 273. In that case, by virtue of s. 50 of the Banking and Financial Institutions Act 1989, the assets of the judgment creditor, who was the Standard Chartered Bank, were assigned (by way of a vesting order) to Standard Chartered Bank Malaysia Bhd (SCBMB), who then applied by summons to amend the creditor's petition and substitute SCBMB as the judgment creditor in place of Standard Chartered Bank in the pending bankruptcy proceedings (after BN and CB had been issued). With the vesting order all judgments obtained by Standard Chartered Bank were assigned to the newly incorporated Standard Chartered Bank Malaysia Bhd (SCBMB). In opposing the application the judgment debtor in that case contended that the application by SCBMB was to substitute another party to replace the judgment creditor and was not allowed under the Bankruptcy Act or the Bankruptcy Rules.

[21] The objection by the judgment debtor was dismissed by the Court of Appeal. The court held that "it was only appropriate for the respondent (SCBMB) to amend the petition by substituting the name of Standard Chartered Bank Malaysia Bhd for Standard Chartered Bank because of the vesting order". The court also held that r. 274 and r. 276 of the Bankruptcy Rules 1969 would justify the amendments.

[22] The facts in *Dato' Fathi Ahmad*'s case and the present case before this court have something in common: ie, both involve the status and effect of valid absolute assignments as a basis to substitute the judgment creditor in pending bankruptcy proceedings and the same nature of applications. In that case, the assignment was valid under s. 50 of the Banking and Financial Institutions Act 1989; while in the present case, the assignment was valid under s. 4(3) of the Civil Law Act 1956. Even though their validity is based on a different set of laws, their legal effect is still the same, ie, an absolute assignment is validly created. Therefore, it is only appropriate for the respondents in the present case to be accorded the same entitlement in law to substitute the assignee as the judgment creditor in the pending bankruptcy proceedings.

[23] The appellant cited the case of *Malaysia Building Society Berhad v. Tan Sri Ungku Nazaruddin Ungku Mohamed (supra)* to support his contention that the Bankruptcy Act 1967 does not confer any power on the High Court, in the exercise of its bankruptcy jurisdiction to adjudicate on matters relating to the validity of an alleged assignment of debt due under a judgment.

[24] The decision of the Court of Appeal in that case is clearly distinguishable from, and therefore not applicable, to the facts of the present case. In that case, the issue before the court was whether or not the High Court in a bankruptcy matter has the power to award damages to a debtor upon annulling and rescinding the adjudicating and receiving orders. The court held:

(a) Whilst s. 24(c) of the Courts of Judicature Act 1964 confers a bankruptcy jurisdiction on the High Court, the powers that it may exercise in relation to the rescinding and annulment of receiving and adjudicating orders are to be found at s. 105 of the Bankruptcy Act 1967;

(b) Section 105 did not confer a power on a High Court exercising bankruptcy jurisdiction the power to award damages; and

(c) Hence the bankruptcy court, should not, in rescinding and annulling the receiving and adjudicating orders, have awarded damages for tort of abuse of process.

Order 46 r. 2 Of The Rules Of The High Court

[25] The appellant also contended that the 2nd respondent (as assignee) lacked the *locus* to execute the judgment or to continue the bankruptcy proceedings initially commenced by the 1st respondent at the High Court, by reason of his failure to obtain leave of the court (from the court which ordered the judgment) to execute or to enforce the judgment pursuant to the provisions of O. 46 r. 2(1)(b) of the Rules of the High Court 1980.

[26] Order 46 r. 2(1)(b) provides:

> (1) A writ of execution to enforce a judgment or order may not issue without the leave of the court in the following cases, that is to say:
>
> (a) ...
>
> (b) where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order;

[27] Order 46 r. 2, talks about "A writ of execution to enforce judgment ..." It refers to the process for enforcing or giving effect to the judgment of the court. There are strong authorities which say that bankruptcy proceedings do not fall within the ambit of writ of execution as defined under O. 46 r. 1 RHC 1980. This principle was established as far back as 1898 in the case of *Re A Bankruptcy Notice* [1898] 1 QB 383, where Chitty LJ at p. 387, ruled that "the issue of a bankruptcy notice is not a form of execution". (see: Federal Court's decision in *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787; *Re Mohamad Fadzimi Yaakub, ex p United Malayan Banking Corp Bhd* [1998] 1 CLJ 783; *The Supreme Court Practice 1822*, vol. 1, para. 46/2/1).

[28] Abdul Hamid Mohamad FCJ in *Perwira Affin Bank (supra)* observed as follows:

> Furthermore, if we bear in mind that the words used in our O. 46 r. 2 RHC 1980 and in the English Rules are "A writ of execution to enforce a judgment ...", clearly a bankruptcy notice or a bankruptcy petition cannot be "a writ of execution." So, in my view, our courts have been correct in holding the view that no leave of court is necessary to issue a bankruptcy notice after six years as required by O. 46 r. 2 RHC 1980.

[29] Even assuming O. 46 r. 2 of the RHC 1980, is applicable to bankruptcy proceedings, it is clear from the very wordings of the provisions that leave would only be needed in respect of the 'issuance' of the bankruptcy proceedings ie, when the bankruptcy notice and creditor's petition were issued. The "leave" that is referred to in O. 46 r. 2 refers to "leave to issue" writ of execution. The word "issue" means to commence or to take out. In the present case, the bankruptcy notice and creditor's petition have already been issued in the name of the 1st respondent. The application for substitution of the judgment creditor in the present case came after the "writ of execution" has been issued. Order 46 r. 2(1)(b) clearly intends to refer to cases where there has been a change in parties before a "writ of execution" is issued.

[30] In the present case, the judgment was obtained by the 1st respondent. The 1st respondent then validly commenced the bankruptcy proceeding by issuing bankruptcy notices and creditor's petition. At that stage, there was no requirement at all to get leave under O. 46 r. 2(1)(b). Any change of parties subsequent to that stage of the proceedings, requires no leave from the court under the said order for the simple reason that the proceedings have commenced when bankruptcy notice and creditor's petition have already been issued.

[31] For the above reasons, this court is of the view that the appellant's contention on this issue is unsupportable and therefore must fall.

Other Matters

[32] The appellant also raised the issue that by reason of his failure to obtain leave of court to enforce the judgment, the 2nd respondent cannot be said to be a person who is "for the time being entitled to enforce a judgment" within the meaning of the proviso to s. 3(1)(i) of the Bankruptcy Act 1967. In short, the appellant was saying that the 2nd respondent was not a creditor. The appellant argued that before a judgment creditor may issue a bankruptcy notice based on a judgment against a judgment debtor, the judgment creditor must satisfy the criteria stipulated in the provisions of the proviso to s. 3(1)(i) of the Act, which reads:

Provided that for the purpose of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order

[33] We are not in agreement with the appellant on this point. As stated earlier in this judgment, the deed of assignment in question was a legally valid absolute assignment under s. 4(3) of the Civil Law Act 1956. Any absolute assignment of any debt of which notice in writing has been given to the debtor or other person from whom the assignor would have been entitled to receive or claim the debt is effective in law to pass and transfer the legal title to the debt to the assignee. In this case, cl. 1 of the said deed of assignment provides that "all the assignor's title and interest in the said debt together with the right to recover and receive payment of the said debt as well as the benefit of all and any security or collateral given by the defendant ...; the benefit and advantage of the judgment ... but not limited to the right to pursue and/or proceed and/or continue with the said action against the defendant" were absolutely assigned to the assignee. In cl. 2, the assignee had agreed "to proceed with the action in the name of the assignee and to execute all papers necessary for the continuation of the said action and to receive the benefit of the same whether in settlement, judgment, foreclosure, sale, surplus monies, proceedings, bankruptcy or otherwise.

[34] On that basis, the 2nd respondent (as the assignee) is clearly "a person who is for the time being entitled to enforce a final judgment or final order and shall be deemed to be a creditor who has obtained a final judgment or final order" as stipulated under the proviso to s. 3(1)(i) of the Bankruptcy Act 1967. Thus the appellant's contention on this issue holds no water and accordingly falls.

[35] Giving the words of cls. 1 and 2 of the deed of assignment its ordinary meaning the learned Judicial Commissioner was right in holding that the said assignment was an absolute assignment within the meaning of the provisions of s. 4(3) of the Civil Law Act and not a partial assignment as contended by the appellant. The costs awarded under the final judgment formed part of the subject matter of the assignment. That in law, the 2nd respondent

A is entitled to be substituted for the 1st respondent as the judgment creditor in the pending bankruptcy proceedings against the appellant.

[36] The appellant also raised the issue of interest in that the
B assignment in question comprised of interest under the judgment which was for a period in excess of six (6) years from the date when the interest became due, the recovery which, according to the appellant, was barred by the provisions of s. 6(3) of the Limitation Act 1953. That being the case the appellant argued
C that the said assignment is not an absolute assignment within the meaning of the provisions of s. 4(3) of the Civil Law Act 1956, and therefore not effectual in transferring to the 2nd respondent the legal rights and remedies under the judgment dated 26 February 1999.

D **[37]** We are of the view that the above contention of the appellant is totally misconceived. In this case the judgment was dated 26 February 1999; and the bankruptcy proceedings commenced on 11 October 2004. At the date of filing of the
E bankruptcy proceedings there was no issue of limitation *vis a vis* interest. The proceedings were brought within the stipulated period of 12 years under the same section. It was a valid proceeding then. Section 6(3) of the Limitation Act 1953 merely states that no arrears of interest in respect of any judgment debt
F shall be recovered after the expiry of six (6) years from the date on which the interest became due. The issue of recovery of interest after the expiry period of six (6) years raised by the appellant does not in any way affect the validity of the bankruptcy proceedings particularly the bankruptcy notice and the creditor's
G petition in this case. Thus it is not relevant to the application by the respondents to substitute the judgment creditor *vide* encl. 16, which is before the court.

Conclusion

H **[38]** For the above reasons, the court holds that there is no legal impediment to stop the 2nd respondent from substituting the 1st respondent as the judgment creditor in the pending bankruptcy proceedings against the appellant. The 2nd respondent is clearly

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entitled in law to do so, in the circumstances of the present case. The appeal is accordingly dismissed with costs of RM5,000 to the respondents and directed the deposit to be paid to the respondents on account of costs.